

1 And the other cases, Your Honor, interpreting Torres
2 that were cited in the brief, the Cascade case. The issue was
3 not the same as whether the order was properly identified in
4 the notice of appeal. Had nothing to do with the parties.
5 But the court went on to say that the importance is giving
6 fair notice of the appeal, and went on to say that the
7 specificity requirement in Rule 8001 is less than FRAP 3(c).

8 And finally in the Milton case, some connection with
9 the case here, it's a Fifth Circuit 1991 case. It concerns
10 sanctions that were issued against an attorney and his client,
11 and the appeal only named the client. And there was a motion
12 to dismiss the appeal because it didn't name the attorney.
13 And the court went on to say, the Fifth Circuit said, again,
14 8001 is less stringent than 3(c), it's less specific.

15 It held that the parties referred -- parties, the
16 term parties referred to litigants, and so the attorney didn't
17 need to be specifically named. And went on to say the purpose
18 of the rule is to give fair notice to the other parties of
19 who's appealing.

20 I think there's a reason why Rule 8001 is more
21 liberal. In Bankruptcy Court we don't deal with the same
22 issues that occur in regular litigation in District Court. In
23 Bankruptcy Court we have multiple parties, multiple interests.
24 We have -- we allow groups under 2019 to be represented, we
25 have committees. So it makes sense that the rule under 8001

1 would not be as stringent as under 3(c), which is exactly what
2 these cases hold.

3 So, finally, to say that in any way these people
4 were prejudiced -- the debtors were prejudiced by this notice
5 of appeal I think is in error. It was a proper notice. I
6 think if anything it went overboard. I probably could've just
7 said the LPG, but it said referred specifically to the 2019
8 statements, which are part of the record, which identify the
9 name and address of each and every member of the group. So
10 for that reason I think the notice of appeal was proper.

11 Any questions, Your Honor?

12 JUDGE JONES: Thank you, Mr. Smith.

13 MR. SMITH: All right.

14 JUDGE PRO: Thank you, Mr. Smith.

15 Ms. Chubb.

16 MS. CHUBB: Thank you. I'd like to incorporate Mr.
17 Smith's statements. And we're [sic] all the appellants, but I
18 just want to make the record clear.

19 I'm gonna try not to be repetitive or to get into
20 the issues that are truly issues on appeal, but it may be
21 difficult because we all seem to digress here.

22 I'm really concerned that we're here today on this
23 emergency motion, which motion says, "that there's

24 irreparable harm in as much as the appeal has the effect
25 of delaying the finality of the confirmation order, which

1 in turn may -- not will -- may jeopardize the 67-million-
2 dollar asset sale."

3 And they say specifically:

4 "A condition of the purchaser's obligation to close
5 the sale is that the plan has been confirmed by a final
6 order of the Bankruptcy Court."

7 And I made people run around this morning madly,
8 after I got here, so I could have this transcript where Mr.
9 Davis, who represents Compass, specifically says to Judge
10 Riegle:

11 "Your Honor, you ask whether or not we would be
12 willing to waive the formality of the confirmation order.
13 The answer is yes, since Your Honor has already granted
14 us protection under" -- it says 373 but it should be 363.

15 The entire basis for bringing us here this morning
16 is -- is wrong. We don't need a confirmation order for
17 Compass to close. And Compass has waived that condition,
18 therefore, the debtors here are not at risk. I understand
19 that they would like to get rid of our appeal, but
20 representing to the Court that it is necessary to have the
21 confirmation order because of Compass is just not the case.

22 And then we find out this morning when we get here,
23 this happens so many times in the lower court. Last night
24 -- or this morning there's a motion filed to allow the sale
25 to close without Compass being licensed. I was advised, and

1 you could confirm this with the debtor, that USA or Mesereau
2 or maybe Mr. Allison will continue to service. They're gonna
3 close. There is no emergency here. That sale is gonna
4 happen, and it isn't dependent upon a confirmation order.

5 Now as to whether my clients are properly before the
6 Court, certainly Mojave and Valtus [phonetic] and the Anderson
7 Trusts are. And the reference to the Keyo [phonetic] family
8 members was as a matter of convenience. We have filed 2019
9 statements, we've listed every person in the Keyo family,
10 every entity that's part of the Keyo family. We've listed
11 every loan. Moreover the debtors have every record of every
12 loan. They know exactly who they're dealing with. And I have
13 been in this bankruptcy case since the inception of the case.
14 This issue has never, ever been raised.

15 The whole idea of having the name on there is so the
16 appellee is aware of who's taking appeal. They are fully
17 advised as to who's taking that appeal. And we referred to
18 the 2019 statement.

19 Moreover, it doesn't do them any good this morning,
20 unless the entire appeal is dismissed, and that is the
21 objective. But we have properly -- exactly named parties, and
22 I'd submit that the Keyos are appropriately named and
23 sufficiently named.

24 And we have legal issues because my clients' filed
25 proofs of claim. My -- some of my clients filed an adversary

1 before the date to object to the confirmation order. We
2 raised the legal issues, and the legal issues are those issues
3 to be decided on appeal. We didn't bring in evidence because
4 we were talking about legal issues. You can't -- you know,
5 you cannot -- let me just try and address your question that's
6 a little to the side. You say why can't they just keep the
7 money if they paid it out before? Because we didn't have the
8 right to assert our pre-petition setoffs.

9 I have one couple who got prepaid interest of about
10 -- around a million dollars that was paid out, and that money
11 has been withheld and that's -- that money is in the
12 segregated account where there's no commingling. And it's
13 very confusing I think to you, since you're new to this, to
14 know about what accounts are commingled and what aren't.
15 Post-petition, there was no commingling.

16 The lower court allowed monies to be held there,
17 that represented an amount equal to the monies that were paid
18 out. But those monies are easily traced. We know exactly who
19 that money belongs to. But my clients also, out of the
20 commingled funds, had about a million dollars of their
21 principal diverted.

22 So under Section 553 we get to set off the pre-
23 petition claim, that is the money in prepaid interest that
24 they'd paid us, against the money that was stolen, the un-
25 remitted principal. We filed an adversary asserting those

1 rights. We raised those rights as part of the objection to
2 the plan, and those are the rights that we're trying to
3 preserve.

4 And we are aggrieved because without any adversary,
5 without any hearing, without those issues being addressed,
6 except for the judge to say, no, you're not entitled to them,
7 we didn't get any recourse. We got no opportunity for a
8 setoff. Judge Riegler explained that it would be inequitable
9 because maybe clients who had unremitted principal would get
10 more, but that's always the case. If you have two creditors
11 in a case and one has a setoff and one doesn't, one person
12 gets more. I mean otherwise 553 wouldn't be in the code.

13 So we are aggrieved, we are named, we have legal
14 issues. We didn't have to come in and provide any evidence,
15 and we're here on appeal. And today's issues are just do we
16 get an emergency dismissal because we didn't name or we didn't
17 bring in evidence? That can't be the case.

18 We're here as aggrieved people, we've filed proofs
19 of claim, they've listed us as creditors, we've asked for
20 setoff, we filed an adversary. We are not getting any of
21 those rights, and we believe that that's just wrong, and those
22 are the issues that need to be addressed on the appeal.

23 JUDGE PRO: One question, with regard to the
24 existence or nonexistence of an emergency.

25 MS. CHUBB: Mm-hmm.

1 JUDGE PRO: Is it your position then that February
2 16th, two day hence, what is pending in the form of an appeal
3 in this Court at this time, doesn't impact the sale on the
4 16th?

5 MS. CHUBB: I'm saying that Compass cannot -- cannot
6 say they can't close because there is no confirmed order.
7 They may -- whatever our appeal rights are, they are, and
8 we're stuck with whatever we're stuck with, based on the 363
9 sale. Those are all issues that aren't here today.

10 JUDGE PRO: And they can't back out on the 16th
11 because of that?

12 MS. CHUBB: I'm saying they can't, because they
13 waived it in the record and they have to close. If they're
14 gonna close, they're gonna close. And now apparently they've
15 filed some motion that says, I presume, let us close on
16 different conditions.

17 So being here today is unnecessary. And dismissing
18 the appellants for these reasons would be, I think, contrary
19 to the -- to Rule 8001 because they absolutely, positively
20 know who they're dealing with. So that shouldn't be a basis
21 for dismissal. Our appeal should go forward and this motion
22 should really, really be denied.

23 Thank you.

24 JUDGE PRO: Thank you.

25 Mr. Kirby, were you going to --

1 MS. CHUBB: Thank you, Your Honor.

2 JUDGE PRO: I don't -- Mr. Kirby, did you have
3 something to add?

4 MS. JARVIS: I didn't address his -- you know, his
5 is a separate appeal and I didn't address it, but I can if you
6 think it would be helpful. I thought we would finish the
7 first ones first --

8 MR. KIRBY: You're right, she --

9 JUDGE PRO: You're right.

10 MS. JARVIS: -- and then move to that, but --

11 JUDGE PRO: All right. You had other argument to
12 present on --

13 MS. JARVIS: Yeah, right. I would like to, you
14 know, to --

15 MR. KIRBY: Your Honor?

16 JUDGE PRO: Yes.

17 MR. KIRBY: I have more than five minutes to say
18 about this. And particularly since I didn't get an adequate
19 opportunity to brief it.

20 JUDGE JONES: No, he's gonna give you a chance to
21 respond.

22 MR. KIRBY: So, she's going to --

23 MS. JARVIS: Right. No --

24 MR. KIRBY: -- she's gonna argue her motion and then
25 we're gonna continue and finish the argument over the noon

1 hour is -- we're gonna continue?

2 JUDGE JONES: Right. We're gonna keep going, if
3 that's okay.

4 MR. KIRBY: Very good.

5 MS. JARVIS: Yeah. What I was --

6 JUDGE PRO: Right. We have to because I've got an
7 MDL case at 2:00 I've got to get to, so.

8 MR. KIRBY: Very good.

9 MS. JARVIS: What I was just suggesting is that he
10 have his own separate time to argue his appeal.

11 JUDGE PRO: Well, you're both gonna have an
12 opportunity, sure, yeah.

13 MS. JARVIS: But that's all I'm saying.

14 And I would just like to reply briefly then to the
15 motion to dismiss on the --

16 JUDGE PRO: We'll give you a brief opportunity to
17 reply to Ms. Chubb and --

18 MS. JARVIS: Right.

19 JUDGE PRO: -- and Mr. Smith --

20 MS. JARVIS: Right.

21 JUDGE PRO: -- and then you can make your argument.

22 MR. KIRBY: Maybe she ought to reply just one single
23 time, Judge, with all due respect to -- do you want her to
24 bounce up and down, let her make --

25 JUDGE PRO: Well, why not. That's a good point.

1 Why don't you go ahead and present your argument that Mr.
2 Kirby can respond to and then we'll let you reply to
3 everything.

4 MS. JARVIS: Okay. Let me --

5 (Pause in the proceedings)

6 MS. JARVIS: With respect to the DAC appeal, there
7 were some, you know, overlapping issues. There are some
8 different issues. They obviously don't have an issue with
9 respect to the 8001 appeal, but do have an issue with respect
10 to our primary basis for asking for these motions to dismiss,
11 which is a failure to preserve their rights at the trial
12 court level, which then results in them lacking standing on
13 appeal.

14 The issues on appeal for DACA are simply the issues
15 of whether the loan servicing agreements were properly
16 transferred under 363 as nonexecutory contracts, or whether
17 they were required to be assumed and unremitted principal
18 claims paid as cure amounts, and whether the rights of the
19 Direct Lenders were modified by the confirmation order and
20 whether the compromise was appropriate under the plan. Let me
21 take each of those separate.

22 With respect to the loan servicing agreements as
23 executory contracts, DACA has not even shown that it is a
24 party to the loan servicing agreements. If you look at the
25 evidence they submitted below, and unlike The Lender

1 Protection Group, they actually did submit an affidavit with
2 claims. They said we have diverted principal claims, which
3 are claims they bought of people that had principal diverted
4 pre-petition or paid to other parties. And they also said we
5 bought assignments of interests. But there is no evidence
6 they took an assignment of a loan servicing agreement.

7 And in -- as cited in our reply brief, the
8 evidence, which was presented below in Mr. Allison's
9 declaration, was that typically a loan servicing agreement
10 encompassed all loans by a lender and they averaged three
11 to four loans per investor. And so, at best, they are
12 derivative with respect to rights in the loan servicing
13 agreement because they simply bought, you know, certain
14 rights of parties to the loan servicing agreement, and,
15 therefore, they have no standing to dispute issues with
16 respect to the loan servicing agreement.

17 Further, as I previously argued, this issue was
18 specifically included in the compromise with the Direct
19 Lenders class, which voted in favor of the plan. As the Court
20 determined below, these -- all of these parties, including
21 DACA, the LPG, and the Jones Vargas appellants, were given
22 adequate notice and an opportunity for a hearing and did not
23 present any evidence to dispute the compromise or preserve
24 their rights with respect to the compromise. And, therefore,
25 this issue is -- they have no standing to raise it because

1 they did not preserve these rights below.

2 On the modification issue, I think I covered that
3 previously. This was an accommodation that was offered by
4 Compass to carve out certain rights that was made on the
5 record on -- at the confirmation hearing. And parties for
6 these appellants were all there. No one objected to that
7 compromise, and, therefore, there was no objection that was
8 interposed at this concession that was made by -- by Compass
9 on the record. And consequently, there is no standing to
10 appeal that issue, because there was no objection raised
11 below.

12 The compromise, again, the third issue which is
13 whether this compromise was appropriate, again, that issue was
14 not preserved as the trial court found below. No evidence was
15 presented to counter the debtor evidence, to show any rights
16 to the prepaid interest at issue. And having diverted
17 principal claims, which is what they did show, doesn't
18 establish a claim in the prepaid interest, absent tracing, and
19 no evidence of tracing was shown below. And for these
20 reasons, we would argue that this appeal should be dismissed
21 for lack of standing as well.

22 JUDGE PRO: Thank you.

23 Now Mr. Kirby.

24 MR. KIRBY: Your Honor, I apologize for bringing the
25 hardware up here. I'm not embarrassed to say it. I haven't

1 had enough time to brief this appeal and not enough time to
2 prepare for this argument, but I'm gonna do my best.

3 There's no way that this Court can enter a final
4 order on this appeal, and Your Honor, Judge Jones, you know,
5 mentioned that fact. And if they're not just crying wolf
6 about this problem, then there's no help for them here today
7 by Friday, and that's a fact.

8 And I don't think that it's any business of this
9 Court or anybody standing here to speculate about what Compass
10 might do. The emergency as being presented to the Court is
11 that we need a final order by Friday. Well, that's -- that's
12 an impossibility. And I haven't heard anything in this
13 argument that indicates that it is a possibility.

14 Now I want to go directly to the argument raised in
15 the reply that I wasn't served with and that got filed last
16 night while I was traveling here to appear, and that I got to
17 borrow 15 minutes before I came into the courtroom. The
18 argument is that Debt Acquisition Company, my client, is not a
19 party to these loan servicing agreements, and, therefore, has
20 no standing to raise any legal issues that relate to the
21 agreements.

22 And the reply itself at page 5 says, and I'm quoting
23 now, that DACA may have a, quote, "derivative interest", end
24 quote, in the loan servicing agreements. And that term was
25 used again by Ms. Jarvis just now in her argument.

1 The reply doesn't say, and Ms. Jarvis didn't say,
2 that DACA's loan serve -- loan interest that it bought for
3 3.6-million-dollars before this plan was confirmed aren't
4 subject to the terms of the loan servicing agreement.

5 The reply doesn't say, and Ms. Jarvis doesn't say,
6 that DACA isn't bound by the loan servicing agreements.

7 At the time of the confirmation hearing and the
8 record designated by DACA, which isn't at my fingertips of
9 course, indicates, and I don't think Ms. Jarvis is gonna deny,
10 that the debtor was servicing DACA loans prior to and at the
11 time of the confirmation hearing, and retaining servicing
12 fees, which I think has something to do with these loan
13 servicing agreements.

14 And I want to tell the Court or try to tell the
15 Court how important an issue this really is. And these loan
16 servicing agreements say, among many other things, that the
17 loan servicer as a right to retain, as part of its fee,
18 default interest and late charges collected by the servicer.
19 Now that's -- even in the loans that DACA's involved in,
20 that's millions of dollars.

21 Now if today, yesterday, this debtor, as the loan
22 servicer, collected 4-million-dollars in default interest on
23 one of these loans, a not unrealistic figure to suggest, does
24 DACA's share belong to DACA? They're gonna say no. Compass
25 surely is going to say no, they're not even appearing here

1 today. So how can you argue that DACA is not effected
2 pecuniarily and directly by the transfer of these loan
3 servicing agreements?

4 If these agreements are breached, the counter
5 parties to the agreements, The Direct Lenders have a right to
6 terminate the agreement and a right to change loan servicers
7 that exist, not only under this agreement, but under the law
8 of the State of Nevada.

9 Now the confirmation order has almost a page, and if
10 you look at the confirmation order, which is part of the
11 volume of exhibits that were submitted to this Court, on page
12 6 of that order, it's almost a full page of conditions and
13 qualifications and changes to that right to change loan
14 servicers under Section 3. Not the right to terminate under
15 Section 8, that's done away with by the confirmation order,
16 but the right to change loan servicers. And one of the
17 things that this confirmation order says, among many others,
18 limiting the right to change loan servicers, that's
19 guaranteed by Nevada law, is that neither The Direct Lenders
20 nor any replacement servicer selected by such Direct Lender
21 shall have the right or ability to compromise, subordinate or
22 impair, in any respect, any rights, claims, or interest
23 purchased by Compass from the estates for default interest,
24 late charges, success fees and so forth.

25 So an issue exists under these contracts about who

1 these millions of dollars in default interests and late
2 charges belong to. Do they belong to Compass, even if Compass
3 doesn't collect it? If The Direct Lender compromises in an
4 effort to collect its loan, because we do have the practical
5 problem of collecting the loan from the borrower. If the
6 Direct Lender compromises those millions of dollars in default
7 interest, does it owe the money back to Compass under this
8 provision of the plan confirmation order that wasn't mentioned
9 in the plan and was just added in to this confirmation order
10 as part of the second so-called compromise?

11 DACA is standing in the shoes of at least --
12 actually it's a lot more since confirmation -- 3.6-million-
13 dollars in Direct Lender interest.

14 Now they're trying to get DACA's appeal dismissed,
15 and there's such a thing as judicial estoppel. So I'm
16 inviting the Court to ask Ms. Jarvis and ask her specifically,
17 do you contend that DACA is bound by this loan servicing
18 agreement? Do you contend that -- or that DACA's is not
19 bound? Do you contend that DACA is not subject to all of
20 these provisions of this confirmation order and of this
21 agreement because it's not a party? I don't think that's a
22 position that even they dare to take, much less what Compass
23 is going to take when we walk out of this courtroom. And
24 remember, that if Compass takes a contrary position, the
25 Bankruptcy Court has reserved jurisdiction to try to figure

1 this out. In other words, to try to apply what this plan says
2 to the rights of not only DACA but all of these Direct Lenders
3 vis a vis Compass.

4 And that goes, Your Honors, to the issue that Judge
5 Roberts you -- or Judge Jones, excuse me, I'm sorry -- you
6 raised, which is what about 363(m). And I want to talk about
7 that for a minute. I mean it was raised in the context of do
8 we really have an emergency here. But it's really sort of a
9 preview of the next motion. I mean if we don't manage to get
10 rid of all these appeals by crying wolf about their final
11 order requirement and their sale that's supposed to close on
12 Friday, and they close the sale, they'll be back before this
13 Court saying now we're gonna make another motion. We're gonna
14 dismiss these appeals because they're moot under Section
15 363(m).

16 And I've already read to you from the confirmation
17 order how these contracts are modified in their terms by this
18 confirmation order. But let's make it simpler. I mean let's
19 say that you have a loan servicing agreement and the servicing
20 agreement calls for a fee of 1 percent. And you say, well, we
21 need to sell these agreements to get money for the estate to
22 fund litigation. So what we're gonna do is we're gonna sell
23 these contracts. Executory, not executory, doesn't matter,
24 we're gonna sell 'em. But in order to make these more
25 attractive to sell, what do you say we raise the 1 percent to

1 3 percent. It's not as ridiculous as it sounds. It almost
2 happened. All right?

3 Now can you do that? In all of these loan servicing
4 parties, can you rewrite their contracts and assign them to
5 somebody else as part of the bankruptcy process? And then
6 when Compass gets this assignment of these modified contracts,
7 are they able to say, well, you know, that does sound a
8 little funny, but 363(m), whatever the Bankruptcy Court says
9 applies.

10 Well, does 360(m) -- 363(m) and all it says is that
11 an appeal of the sale order does not effect the, quote,
12 unquote, "validity of the sale". Right. What are they
13 selling? I mean are all of those issues mooted by 363(m)?
14 Can we change contracts and transfer and assign those
15 contracts and have all of those arguments or all of those
16 issues swept under the rug because of 363(m)? I think that's
17 a substantial issue on appeal, and it is an issue that is
18 going to survive as a major issue between DACA and all of Mr.
19 Smith's clients and Compass, even if that sale goes forward.
20 And this appeal, under the law of the Ninth Circuit, as I
21 understand it, won't be moot for those -- for those very
22 reasons.

23 Now finally on the compromise. What is being
24 suggested here is that you really can rewrite these contracts.
25 You can even make it 1 percent to 3 percent if two-thirds of

1 the people in the group of people who happen to be counter
2 parties to these contracts agree. That's a remarkable
3 proposition, and I'm not sure it's correct.

4 I mean these Direct Lenders have claims, many of
5 them monetary claims. And certainly their rights under these
6 contracts can be classified as claims. They're not dealt with
7 as such under the plan. They're not put in a class under the
8 plan, as far as I'm able to tell.

9 But does calling them claims mean that two-thirds of
10 the people in a like class of creditors can agree to amend the
11 contract for the rest of the counter parties? These are third
12 parties. They are Direct Lenders whose loans are being
13 serviced by this debtor. And we contend, and it's going to be
14 an issue on this appeal, regardless of whether this sale
15 closes, that they cannot.

16 So for this Court to entertain these summary
17 proceedings where, and, again, I'm not ashamed to say it, I
18 don't think that the appellants here have been given a fair
19 chance to brief these issues. To dismiss these appeals is
20 uncalled for. And certainly, if any part of these appeals
21 survive, it is I think imprudent of this Court, as an
22 appellate court to dismiss any of them, including mine.

23 Thank you.

24 JUDGE PRO: Thank you, counsel.

25 Ms. Jarvis, we'll now let you reply to all of the

1 arguments. And why don't you start with Mr. Kirby's
2 arguments, since that will be freshest in everyone's mind.

3 MS. JARVIS: Your Honor, with respect to the loan
4 servicing agreements, while they've taken claims under it, you
5 know, they've taken interest under it again. The loan
6 servicing agreements cover -- you know, the evidence is that
7 they cover an average of three to four loans with an
8 individual investor.

9 Now that does mean that they, you know, I think are
10 bound by it because they took a partial interest in it from,
11 you know, the lender, but the lender themselves are the party
12 to it and they're the party that has the standing to raise
13 those issues, not someone who takes a piece of their interest,
14 which is what we're talking about here.

15 And there is no evidence, again going back to -- all
16 of this goes about what evidence was presented below. There
17 is no evidence that was presented that they are parties to a
18 loan servicing agreement. In fact, while this is not in the
19 record because it's happened thereafter, but we have -- and we
20 did file a motion to require them to sign a loan servicing
21 agreement, which they have refused to do to date. It's an
22 issue that still is up in the air.

23 JUDGE PRO: I just want to make sure I understand.
24 Is DACA party to -- subject to the loan service agreements --

25 MS. JARVIS: Okay.

1 JUDGE PRO: -- under the confirmation order?

2 MS. JARVIS: I think they are subject to it in the
3 sense that they took a piece of something that the party that
4 is subject to the loan servicing agreement, you know, has.
5 And they can't take that piece and not, you know, be governed
6 by the same rules.

7 But as far as that loan servicing agreement itself
8 and what happens with that contract, that -- the standing to
9 deal with that is in the party -- is the party to the loan
10 servicing agreement that covers an average of three to four
11 loans, as the evidence was presented below. And there is no
12 evidence to show that they are a party, you know, meaning the
13 party that controls the loans -- any of the loan servicing
14 agreements. And, therefore, because that evidence is lacking,
15 they lack standing to raise this issue on appeal.

16 In addition, Your Honor, with respect to again to
17 the compromise, we go back to this prepaid interest, these
18 funds held by the debtor. All of these parties, none of them
19 have presented any evidence to show that they have any
20 specific claim in those funds. And without presenting any
21 evidence below that they have any claim in that funds, they
22 lack standing to raise that issue on appeal. So, no evidence
23 was presented whatsoever with respect to those funds. And,
24 therefore, we believe that is, you know, a lack of standing.

25 Turning to the appeal of the Lender Protection

1 Group, you know, they -- again going back to the record --
2 they presented no evidence below that they had any interest in
3 these funds that they are disputing, or any claims that would
4 give them an interest in that -- in disputing. I mean Mr.
5 Smith says we all know that all my -- my parties have claims
6 in these funds. How do we know that? We don't know that
7 because no evidence was presented below. And when no evidence
8 was presented below to show that there is some claim that they
9 are pursuing in the trial court, they lack standing to pursue
10 that on appeal.

11 In fact, Mr. Smith admitted in the confirmation
12 hearing that he had different claims. If I read from the
13 transcript on page 84, the transcript of December 19th, the
14 Court says:

15 "Okay, let me ask you the next question. You
16 represent people who had diverted principal, correct?

17 "Mr. Smith: Correct.

18 "The Court: How did they, since their principal was
19 used to pay some of your other clients?

20 "Mr. Smith: Right.

21 "The Court: (A), how is that not a conflict, and
22 (B), how do the people whose money was diverted get that
23 money back?"

24 We don't -- he has not presented evidence to show
25 that they have interest in any of these issues that they've

1 raised on appeal, and that creates a lack of standing where
2 that evidence was not presented below.

3 In addition, as is pointed out by the Court and
4 admitted by Mr. Smith, they're even conflicting interests
5 among, you know, his group. But that evidence is lacking and
6 that evidence results in a lack of standing.

7 The -- these appellants simply showed up and threw
8 out hypothetical problems. Some creditors -- some of their
9 clients might have problems with X, Y, and Z issues in the
10 plan. But without the evidence to support that they actually
11 are aggrieved and effected by that plan, they did not properly
12 preserve their issues on below.

13 Let me then finally turn to the issue with respect
14 to the names on the appeal. And let me review the Torres case
15 and -- I had to go back and refresh my recollection. I know
16 Your Honor asked me about that. And let me just review what
17 that says and why that is important.

18 In Torres it was an employment discrimination
19 action, and Torres was one of 16 plaintiffs. The notice of
20 appeal did not name Torres. The omission was a clerical
21 error. The Supreme Court granted cert to determine whether
22 that failure to file a notice of appeal or to include his name
23 in the notice of appeal, presented a jurisdictional bar to the
24 appeal.

25 Now they looked in that case under old Rule 3. And

1 under that old Rule 3 of the Federal Rules of Appellate
2 Procedure, a notice of appeal was required to, quote, "specify
3 the party taking the appeals". That term actually is even
4 more loose than 8001, which requires you to, quote, "name the
5 parties that are taking the appeals as part of the appellate
6 notice".

7 So -- and the court in that case found that the
8 failure to specifically name Torres was a jurisdictional bar.
9 And the court did note that while this would seem to be a very
10 draconian result, that is the result of the way the rule is
11 written.

12 Now this is important because while Mr. Smith argued
13 that in the Cascade case the court said -- the Ninth Circuit
14 said that Rule 8001 is less lenient -- or is more lenient than
15 Rule 3. They were dealing with the actual -- whether you
16 actually have to attach the order.

17 And they recognized the differences between Rule 3
18 and Rule 8001, because they recognized Rule 3 is actually more
19 lenient on having to attach the order that you're appealing
20 from is -- wait -- is -- wait -- is less lenient -- okay. Now
21 I'm getting mixed up here.

22 Okay, the -- Rule 3 actually is more strict about
23 the order that is -- you know, is less strict about the order
24 that you have to attach than Rule 8001 is. But it's more
25 lenient in respect to parties that you have to name than Rule

1 8001, so the two differs.

2 The court did not say that Rule 8001, you know, was
3 more lenient, it said it only was more lenient with respect to
4 attaching the order. But it did specify that there was a
5 difference between the naming of the parties between them.

6 And in fact, in a later case, in the Dudley case
7 decided by the Ninth Circuit, they again looked at 8001 on
8 this specific issue, which is how strict is the requirement to
9 name the parties. And it specifically cited Torres with
10 approval, because although Torres was decided under Rule 3
11 that changed, Rule 8001 did not change. And they -- that case
12 was then cited with approval, meaning that there is a very
13 strict standard recognized by the Ninth Circuit with naming --
14 including the names of the parties on appeal, and that that is
15 a jurisdictional defect, that if it is not done then the
16 appeal has to be dismissed.

17 Let me finally just address the issue of the
18 emergency. I think as I told this Court last Friday, we are
19 in the midst of discussions on purchase price adjustments.
20 And those go into, you know, the issue of whether we have some
21 finality in the order because, of course, it give some
22 leverage to the buyer with respect to that. And, therefore,
23 it is very important that we get some finality, as much
24 finality as we can in these proceedings in order to be able to
25 close this for the highest price possible for these estates

1 and for returns to creditors. So there is an emergency now to
2 deal with this, because this is part of the negotiations that
3 are going on.

4 Your Honor did state or suggest that 363(m), you
5 know, would require finality. And I agree they could close
6 under that. In the confirmation hearing Mr. Davis, in the
7 context of talking about whether they could close before the
8 end of the year, said we would waive it if we could close
9 before the end of the year. But they were prevented from
10 doing that because the appellants objected to the Court
11 waiving the stay, the 10 day automatic stay with respect to
12 orders, and, therefore, it was impossible to close. So that
13 was the context of that discussion which was prevented by --
14 by the parties objecting to shortening that stay.

15 We obviously will argue, you know, what we need to
16 argue with respect to making sure this closes, but we do think
17 it is important that the Court consider and grant these
18 motions to dismiss.

19 I would say that I think Your Honor, Judge Jones
20 suggested that maybe there is also something the Court could
21 do for us now with respect to a finding that our 363(m)
22 finding is final. And to the extent that the Court would, you
23 know, would make that determination, that obviously would help
24 us as well in this process.

25 Thank you.

1 JUDGE PRO: Thank you, Ms. Jarvis.

2 (Off-record colloquy of the Judges)

3 JUDGE PRO: Counsel, we appreciate your argument.
4 What Judge Jones and I just discussed was perhaps we'd take
5 just a few minutes to discuss the matter amongst ourselves,
6 and if you would just stand by, we won't keep you waiting
7 long, and then we'll return.

8 THE CLERK: All rise.

9 (Court recessed at 12:27:48 p.m. until 12:35:40 p.m.)

10 JUDGE JONES: Thank you. Please be seated.

11 We have determined that we should deny the motion.
12 It's not for want of the argument. One very persuasive at
13 least -- partially persuasive argument to me is the flow of
14 the argument that says they did not contest factually the
15 insolvency. Number two, the commingling. Number three, the
16 lack of possibility of tracing, and, therefore, that they had
17 no direct interest in the funds.

18 A little uneasy about that argument, however,
19 because clearly implicit in the objection and the arguments on
20 the objection is that they did, in fact, have interest in the
21 segregated post-petition funds at least.

22 And the contrary argument on both these first two
23 issues, prepaid interest and executory contracts that, in fact
24 they were asserting essentially legal questions and legal
25 issues, and there wasn't much further that they could have

1 done to sustain their objection in order to preserve standing
2 showing on appeal.

3 With respect to the 8001(c) issue, that one I think
4 we just really need to consider in a normal fashion by an
5 appellate court, and look at the rule, look at the case that
6 you've cited to us and in more leisurely fashion, therefore,
7 a more accurate fashion, give you a ruling on that.

8 We're -- our decision is that we should, based upon
9 this basic analysis, deny the motion at the present time.

10 We will give you a written order that answers
11 specifically the issues raised, whether specific parties are
12 or are not appellants to the case, but that the written order
13 will lay out for you a reason for denying the motion.

14 I think we will not take up your request to opine on
15 the effect of 363(m). That would be -- I don't think an
16 appropriate response to an orally raised question. We would
17 leave that for either your motion to dismiss, in which case we
18 would address it, or appeal of course from the issue being
19 presented in the first instance to Judge Riegler.

20 So we will give you a written order. It will issue
21 in normal course, but we felt we owed you an oral response
22 immediately because of the -- what we both agreed was an
23 emergency -- proper emergency basis for presenting the motion
24 at this time. Okay?

25 Thank you very much.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ATTORNEYS: Thank you, Your Honor.

THE CLERK: All rise.

PROCEEDINGS CONCLUDED AT 12:38:37 P.M.

* * * * *

CERTIFICATION

I (WE) CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

**NW TRANSCRIPTS, LLC
NEVADA DIVISION
1027 S. RAINBOW BLVD., #148
LAS VEGAS, NEVADA 89145-6232
(702) 373-7457
nwtranscripts@msn.com**

FEDERALLY CERTIFIED MANAGER/OWNER

Lori Lutz & Kari Riley
TRANSCRIBER

2/22/07
DATE